

**SUPREME COURT OF THE
UNITED STATES**

OCTOBER TERM, 1945.

No. **1124**

R. E. SCHKEFFLER, doing business as Schreffler Steel
& Supply Co.; and **BYRON G. ROGERS**, Guardian ad
Litem, PETITIONERS,

vs.

CHESTER BOWLES, Administrator, Office of
Price Administration, Respondent.

PETITION FOR WRIT OF HABEAS CORPUS
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

W. David McLean,
FRANK A. BROWN,
Of Counsel,
MICHAEL J. BROWN,
DANIEL J. BROWN,

INDEX.

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutes, Regulations and Rules of Civil Procedure In- volved	2
Statement	3
Reasons for Granting the Writs	4-23
A. The written and oral contracts which the peti- tioners specially pleaded and raised in their Eighth Defense of the Answer to the Amended Complaint did raise a material issue of fact so as to preclude the operation of Rule 56 of the Fed- eral Rules of Civil Procedure in favor of the re- spondent	4-13
B. The limitation provisions of Section 205(e) of the Emergency Price Control Act of 1942 as Amended and Extended June 30, 1944, specially pleaded and raised in petitioners' Fourth Defense to their An- swer raised a genuine issue of fact and law so as to preclude the application of Rule 56 of the Fed- eral Rules of Civil Procedure	14-19
C. The affidavits attached to the respondent's motion for summary judgment were not entitled to any probative value so as to form the evidentiary basis of the judgment rendered against the petitioners ..	19-23
Conclusion	23
APPENDIX	I-IV

CITATIONS.

PAGE

CASES.

Associated Press v. United States, Vol. 89 L. ed., 1512 Adv. Op.	(Note 9) 23
Brown v. Banana Distributors of Connecticut, 52 F. Supp. 804	(Note 5) 12
Fishman v. Teter, 7th Cir., 133 F. 2d 222	(Note 4) 12
Miller v. Miller, 74 App. Dec. 216, 122 F. 2d 209	(Note 4) 12
Ramsouer v. Midland Valley R. R. Co., 135 F. 2d 101	(Note 3) 9
Sartor v. Arkansas Natural Gas Corp., 64 S. Ct. 724; 38 L. ed. 967; 321 U.S. 620	(Note 8) 20
Toeelman v. Missouri Kansas Pipeline Co., 3rd Cir., 135 F. 2d 1016	(Note 4) 12
United States v. Lutz, 3rd Cir., 142 F. 2d 985	(Note 6) 15
Walling v. Fairmont Creamery Co., 139 F. 2d 318	(Note 2) 9
	(Note 7) 19
Whitaker v. Coleman, 5th Cir., 115 F. 2d 305	(Note 4) 12

UNITED STATES.

50 U.S.C.A. App. 313	(Note 1) 2
----------------------------	------------

IN THE
SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1945.

No. _____

R. E. SCHREFFLER, doing business as Schreffler Steel
& Supply Co.; and BYRON G. ROGERS, Guardian ad
Litem, PETITIONERS,

vs.

CHESTER BOWLES, Administrator, Office of
Price Administration, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE TENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of
the Supreme Court of the United States:

The petitioners pray that a writ of certiorari be issued
to review the judgment of the United States Circuit Court
of Appeals for the Tenth Circuit entered on the 12th day of
January, A. D. 1946. (R. page 66).

OPINION BELOW.

The Opinion of the Circuit Court of Appeals for the
Tenth Circuit will be found at pages 61 to 66 inclusive, of
the Record. The opinion is not as yet reported.

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Tenth Circuit which is the subject of this review was entered on the 12th day of January, A. D. 1946. (R. pages 61-66). The jurisdiction of this Honorable Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. (28 U.S.C.A. par. 347 (a)).

QUESTIONS PRESENTED.

The questions presented for determination are:

(1) Whether the written and oral contracts specially pleaded in the Eighth Defense were unlawful per se and thus failed to raise a material issue of fact so as to preclude the operation of Rule 56 of the Federal Rules of Civil Procedure.

(2) Whether the bar of the Statute of Limitations provided for by Section 205(e) of the Emergency Price Control Act of 1942 as Amended and Extended June 30, 1944, which was specially pleaded and raised in the petitioners' Fourth Defense of their answer to the amended complaint, raised a genuine issue of fact or law so as to preclude the operation of Rule 56 of the Federal Rules of Civil Procedure.

(3) Whether the affidavits attached to respondent's motion for summary judgment were entitled to any probative value so as to form the evidentiary basis of the judgment rendered against the petitioners.

THE STATUTES, REGULATION AND RULES OF CIVIL PROCEDURE INVOLVED.

The pertinent Sections of the Emergency Price Control Act of 1942 as Amended and Extended,¹ Revised Price Schedule No. 49, and the Rules of Civil Procedure are set out at pages I to IV of the appendix.

¹50 U.S.C.A. App. 313.

THE STATEMENT.

The respondent, pursuant to the authority vested in him by Section 205(e) of the Emergency Price Control Act of 1942 as Amended and Extended, filed his amended complaint alleging violations of Revised Price Schedule No. 49 in the sale of iron and steel products to several and divers customers, and attached to the complaint Exhibit "A", which enumerated the alleged violations (R. 15-19) and prayed judgment in the sum of \$197,638.35. (R. 8-10).

The competency of R. E. Schreffler was questioned and the trial Court appointed Byron G. Rogers, Guardian ad Litem. (R. 23).

The answer pleaded a general denial and set forth eight separate defenses and demanded a jury trial.

The Fourth Defense pleaded the Statute of Limitations (R. 27) and Exhibit "3" attached to the answer, set forth the sales barred by the Statute of Limitations (R. 35-38). The Eighth Defense alleges a contract of employment which is attached to the answer as Exhibit "4". (R. 38-41).

A motion for summary judgment was filed alleging that the Fourth and Eighth Defenses are false, fictitious and sham and raise no genuine issue of fact. (R. 45-46). Presented with the motion for summary judgment were the affidavits of employees of the respondent which state that the said employees had made a correct and true itemization of all iron and steel products sold. Such itemization was the result of their examining invoices, customers' purchase orders, freight bills, correspondence, and all other records, papers and accounts relating to this litigation, together with the records of the carriers which transported the material, and alleged that the amount of overcharges was \$65,879.49, and that in the opinion of the affiants the denials contained in petitioners' answers have not been made in good faith and are sham, and that the petitioners have no good, valid or substantial defense on the merits and were interposed for the sole purpose of delay. Thereupon summary judgment was granted by the trial Court.

A. THE WRITTEN AND ORAL CONTRACTS WHICH THE PETITIONERS SPECIALLY PLEADED AND RAISED IN THEIR EIGHTH DEFENSE OF THE ANSWER TO THE AMENDED COMPLAINT DID RAISE A MATERIAL ISSUE OF FACT SO AS TO PRECLUDE THE OPERATION OF RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE IN FAVOR OF THE RESPONDENT.

In their Eighth Defense to the amended complaint the petitioners alleged as follows: (R. 31)

“That for the period beginning April 17, 1943 and ending February 17, 1944, the time alleged in paragraph 5 of the amended complaint as the interim in which the alleged violations complained of were committed, and prior thereto, the said R. E. Schreffler was not engaged in the business of buying, selling, and reselling iron and steel products and therefore was not amenable to Revised Maximum Price Regulation No. 49, but on the contrary was in the hire and employ of Aircraft Mechanics, Inc. of Colorado Springs, Colorado, as a material expediter pursuant to a written contract, a copy of which is hereto attached and made a part hereof and marked Exhibit ‘4’, and was, during all times complained of in paragraph 5 of the amended complaint, in the hire and employ of the Douglas Aircraft Company, Inc., Los Angeles, California, in a similar capacity, pursuant to an oral contract, the terms and conditions of which were substantially the same as those recited in Exhibit ‘4’ hereinabove referred to.”

The Court below in its opinion dismisses this defense as raising no genuine issue of fact with the statement that the contracts referred to contained “many of the elements of a contract of sale and purchase”. The petitioners urge that a careful consideration of the provisions and conditions of the contracts will disclose a lawful covenant of employment of a competent and highly regarded engineer by reputable corporations under obligations to their government to expedite production of aircraft under their war contracts.

The preamble to this instrument after very carefully reciting the motives which impelled its execution concluded as follows:

“We agree to and do hereby appoint you as our agent for the engineering, scheduling and procurement of steel and other metal materials for a period of one year from January 1, 1943.”

The language of this paragraph is the usual and customary phraseology used in the appointment of an agent by a principal and calls for the professional skill of an engineer. The “procurement” of the metal materials is only one phase of the obligation it imposes on the petitioner R. E. Schreffler. It requires, in addition thereto, the “engineering” of the steel as well as its “scheduling”. The engineering of steel is the art of designing, modeling and patterning of the metal. Its scheduling, as that term is understood in the industry, includes its orderly laying out, its analyzation for component parts and its scientific treatment. It is common knowledge that the seller of steel does not afford to the buyer these highly technical and professional services required of the petitioner by the terminology of this portion of the contract. It does not require the sale of the commodity but only its procurement by the petitioner in a fiduciary capacity.

Paragraph (a) of the agreement provides,

“You agree:

“To buy at most favorable market at best price consistent with quantity and quality, and obtain all discounts * * * or allowances prevalent in the trade to which either you or we may be entitled.”

This provision authorizes the purchase by the petitioner at best prices. It is part of his obligation to procure. In buying he is required to obtain all discounts that either he or his principal is entitled to. If this were a contract of sale rather than a contract of employment, the Company would not be entitled to the intermediate discount that the petitioner would receive as a buyer from his supplier. They claim it now under the terms of this agreement only because

such intermediate discounts would come to the petitioner not as a purchaser from the supplier, but as the fiduciary for the company. It will be noted that the phraseology contained in this paragraph limits his efforts to the purchase of materials.

Paragraph (b) of the covenant provides,

“You agree:

“To schedule all steel to be purchased by us and furnish all engineering services in connection with the quantity and quality of our steel requirements.”

This paragraph not only requires the the petitioner R. E. Schreffler, to schedule and engineer the steel and metal materials which he procured, but all the steel purchased by the principal from whatever source it came. It is respectfully submitted that a seller is not very often concerned with the engineering and scheduling of steel which comes from competitors.

Paragraph (c) provides,

“To act as liaison officer with the mill for the arrangement of melts and to do all other things necessary or proper for the expediting of all delivery schedules and promotion of the quickest deliveries possible, consistent with our production schedules.”

This paragraph in very definite language requires the services of the petitioner as a material expediter and liaison officer. These services were required of him for the purpose of keeping production moving. It does not limit these activities to the steel and metals that he procured but required him to apply himself as well to “the expediting of all delivery schedules.” The Company had many sources from which it procured steel. The petitioner was obligated to keep moving and expediting materials so that production at the plant would flow evenly in accordance with the Company's production contracts.

Paragraph (d) provides,

“You agree:

“To furnish all engineering and expediting of steel or metal procurement services conformable to the production schedules of the Company; and in that connection to schedule, chart and set up and maintain records of all contracts and production schedules of our Company; and to furnish expert engineering and procurement advice in connection therewith.”

The language of this paragraph should dispel any doubt of the relationship which existed between the petitioner R. E. Schreffler, and the Company for not only does it require him to furnish all engineering on all of the Company's production schedules and contracts, but also requires him to schedule, chart, set up and maintain records of “*all contracts and production schedules of our (the) Company.*” The scheduling, the charting and the expert engineering advice required was for all of the Company's contracts and production schedules. That is to say, he was not only required to schedule, chart, set up and maintain records of all procurements and contracts, but also schedules of the finished product of the Company. This is not a service which a seller supplies to a buyer as an incident to the purchase. The great demand for steel during the war emergency did not lend itself to the need for the supplying of incidental services by a seller to this purchaser in order to effect a contract of purchase and sale.

Paragraph (e) of the covenant required the petitioner R. E. Schreffler to make physical and chemical analysis of all steel purchases made by the Company for the purpose of assuring it that they met the requirements of prime contracts and government specifications and regulations. With all the necessary government regulations of the industry the doctrine of caveat emptor was never abandoned. Accordingly, if the petitioner was a seller instead of an employee, he was under no obligation to see that all steel and metal purchases by the Company should meet the requirements of prime contractors and government specifications.

Paragraph (f) authorized the petitioner, in the dis-

charge of his obligations to procure steel, *"to make all purchases either in the name of this Company or in the name of yourself as agent for this Company."*

This paragraph very definitely intended that the title to all materials purchased by the petitioner should pass from the supplier to the Company in the first instance. The petitioner not having title could not pass it to the Company, and consequently there was no sale.

Paragraph (g) merely prescribes the procedure which the petitioner was to follow in billing the Company for all the purchases made by him and for which he had advanced the money in accordance with the directions contained in paragraph (f).

Paragraph (h) of the agreement provides,

"To carefully study all purchase orders and purchase contracts and purchase proposals entered into by us or submitted to us for performance; to break same down from an engineering standpoint as to steel or other metal requirements; to furnish engineering advice and reports in writing as to the quantity and quality of the various steel and metal materials entering into the performance of same and the estimated cost thereof, together with estimates of the quickest delivery date thereon."

By the terms of this paragraph the petitioner was to supply the services usually required of an estimator. After carefully studying all purchase orders and purchase proposals of the Company he was to give advice as to the cost, the quantity and quality of metal materials entering into the manufacture of the finished product by the Company, as well as estimates of deliveries thereof. It is respectfully submitted that if the petitioner was the seller of the raw materials which went into the production of the Company's finished product, rather than an employee, he would not be concerned with whether or not the Company could realize profits from contracts which were submitted to it for performance.

Paragraph (i) of the covenant obligates the petitioner to make available to the Company the warehousing facilities which he owned at Denver, Colorado, for the purpose of

storing raw materials and the finished products of the Company. The requirement must be examined in the light of the motives which impelled the execution of the contract. Originally reimbursement to the petitioner was to be handled by the differences in price between cost of materials to him and the price paid for materials by the Company. After checking with the Office of Price Administration to determine whether this method was proper under the Regulations, it was found wanting and Widmer, an official of the Office of Price Administration in charge of steel and iron Regulations, suggesting that the petitioner be hired by the Company. This left the petitioner without any need for his warehousing facilities and afforded to the Company facilities near railroad terminals. It was only natural, therefore, that the Company availed itself of them, not as an incident of any sale, but as a facility to speed up production and delivery.

Paragraph (j) permitted the Company to avail themselves of the petitioner's clerical and administrative personnel for the same reasons hereinabove stated.

Paragraph (k) prescribed the method which the petitioner was to use for reimbursement of travel expenses incurred in the discharge of his fiduciary relationship.

It has long been the established law that on a motion for summary judgment, the burden of establishing the non-existence of any genuine issue of fact is upon the moving party. All doubts are to be resolved against him.² The record in the instant case is devoid of any evidence on the principal issue raised by this defense, for neither the affidavits which are offered in support of the motion for summary judgment, nor any other source of information available makes reference to these contracts. In considering the motion, the Court should take the view of the evidence most favorable to the party against whom it is directed, giving to that party the benefit of all the favorable inferences that may reasonably be drawn from the evidence. If when so viewed reasonable men might reach different conclusions, the motion must be denied and the case tried on its merits.³

²Walling v. Fairmont Creamery Co., 139 F. 2d 318.

³Ramsouer v. Midland Valley R. R. Co., 135 F. 2d 101.

It is respectfully submitted that the analyzation of the above and foregoing Sections of the covenants not only permits most favorable and convincing inferences which should be resolved in favor of the petitioners, but also demonstrates that real and material issues are presented upon which reasonable men could reach different conclusions and therein lies the issue of fact which precludes the operation of Rule 56 of the Federal Rules of Civil Procedure in favor of the respondent, and allows and permits the petitioners the right to be tried by a jury.

In addition to determining that the contracts which were the basis of petitioners' Eighth Defense were covenants of purchase and sale rather than of employment, the learned Court below concluded that they exhibited a clear intent to evade Section 1306.151 of Revised Price Schedule 49 by way of "commission, service or otherwise". The pertinent section of the Price Schedule provides,

"The price limitations as set forth in Price Schedule No. 49 shall not be evaded either by direct or indirect methods in connection with the purchase, sale, barter, delivery or transfer of iron and steel products alone or in conjunction with any other material or by way of any commission, service, transportation or other charge * * * or by way of tying agreement or other trade understanding, or otherwise." (App. p. III.)

The petitioners concede that the gravamen is the evasion of the price limitation by direct or indirect methods. But the evasion whether direct or indirect, resolves itself into a question of the intention of the parties. A careful analysis of the quoted Section of the Regulation indicates that it is designed to defeat an unlawful conspiracy between the seller and the purchaser. It requires some degree of guilty knowledge and willingness to circumvent the purpose which the Act was designed to accomplish. In the case at bar the expressed intention of the parties is found in the preamble to the contract, which for the purpose of convenience we set out in full:

"Early in 1942 we solicited your services in the scheduling and procurement of steel and other ma-

terials to be used by us in our production and in our building expansion. Owing to the emergency of our situation, these services were performed by you without definite agreement as to the amount of reimbursement or compensation and without understanding as to how reimbursement or compensation were to be handled. *As you know, it was originally conceived that reimbursement and compensation to you would probably be handled by a difference in price between cost of material to you (which has at all times been fully disclosed to us) and the basic price below the average price theretofore paid by us for like materials... However, it has since been checked and found that the payment of compensation on such a basis would be contrary to the rules and regulations of OPA. Your services as agent are absolutely necessary to our Company and we do not desire to in any way disturb or discontinue the satisfactory and valuable performance you have furnished thus far. The remuneration and reimbursement suggested herein is an endeavor to fix the actual value of your services to the Company on a basis of the knowledge and skill you have displayed, the savings we have received thereby and the efforts expended by you in the accomplishment of these services. Consequently we agree to and hereby do appoint you as our agent for the engineering, scheduling and procurement of steel and other metal materials for a period of one year from January 1, 1943 (unless sooner terminated as hereinafter provided)."* (R. 38).

Thus it is apparent that the parties to this covenant did not intend to enter into any unlawful conspiracy to evade the provisions of the Regulation, but on the contrary, to correct a system of reimbursement to the petitioners which was found wanting under the rules and regulations of the Office of Price Administration after its discussion at length with Mr. F. R. Widmer, Head of the respondent's Steel Branch at the National Office in Washington, D. C., on the 23rd day of February, 1943. It was this determination that caused the parties to enter into and execute these agreements. The remuneration fixed therein was not by

way of any commission or service but rather a fixed and determinable wage commensurate with the knowledge and the skill which Schreffler displayed, the savings which his principal received thereby and the efforts expended in the accomplishment of the agency. The record is destitute of any evidence on the part of anyone that it had its beginning in a malicious and wilful intention to circumvent the Act and the pertinent Regulation. The supporting affidavits to the motion for summary judgment make no mention whatsoever of these covenants or that any consideration was given to them. The Court below therefore was without factual support of its alleged illegality. It was without authority to presume its unlawfulness.⁴ It is not on its face a contract *malum per se*. Any type of agreement is a violation of the Emergency Price Control Act if used as a means of evasion of the maximum price regulation, but it must be made to appear that the contract is so used in order to set up a valid charge of the violation of the Act.⁵

In addition to the failure on the part of the respondent to show that the contracts were used to evade the Regulation, the learned Court below failed to take into consideration Section 302(c) of the Emergency Price Control Act by which Section the Congress limited the sphere of operation within which the Office of Price Administration must operate. The term "commodity" as used in the Act is defined as follows:

"The term 'commodity' means commodities, articles, products and materials * * * and it also includes services rendered otherwise than as an employee in connection with the processing, distribution, storage, installation, repair or negotiation of purchases or sales of a commodity or in connection with the operations or any service establishment for servicing of a commodity, provided that nothing in this Act shall be construed to authorize the regulation of

⁴Toeelman v. Missouri Kansas Pipeline Co., 3rd Cir., 135 F. 2d 1016; Miller v. Miller, 74 App. Dec. 216, 122 F. 2d 209; Whitaker v. Coleman, 5th Cir. 115 F. 2d 305; Fishman v. Teter, 7th Cir. 133 F. 2d 222.

⁵Brown v. Banana Distributors of Connecticut, 52 F. Supp. 804.

*** (5) rates charged for any professional services.”
(App. p. II.)

The services to be rendered under the contracts and those which the petitioner Schreffler did render pursuant thereto, were in truth and in fact services rendered as an employee in connection with the processing, storage and negotiation of the purchase of steel. The rates charged by him are those specifically exempted as charges for professional services. The remuneration made and provided for in the contract was not “the price” which he demanded or received in connection with the sale of a commodity as that term is defined in Section 302(b) of the Act, but rather a charge for technical and professional skills and services rendered in connection with the engineering, scheduling and procurement of steel and metal materials. The record being devoid of any evidence that the contracts were merely an effort to evade the Act and the Regulation, the Court below was not warranted in holding that it did not present a substantial issue of fact, the determination of which was wholly within the province of a jury.

The contract of employment as set up in the Eighth Defense is valid upon its face. There is nothing in the record to indicate that it is invalid per se and made for the purposes of evading the Regulations. The acts performed by the parties pursuant to the contract can only be interpreted after the receiving of evidence. The trial Court without warrant or authority presumed the contract to be invalid per se without evidence of any kind or character whatsoever. The petitioners herein should be afforded the privilege to support their answer by evidence. The entry of the summary judgment and setting aside a legal contract has denied the petitioners their day in Court.

B. THE LIMITATION PROVISIONS OF SECTION 205(e) OF THE EMERGENCY PRICE CONTROL ACT OF 1942 AS AMENDED AND EXTENDED JUNE 30, 1944, SPECIALLY PLEADED AND RAISED IN PETITIONERS' FOURTH DEFENSE TO THEIR ANSWER RAISED A GENUINE ISSUE OF FACT AND LAW SO AS TO PRECLUDE THE APPLICATION OF RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

In the Fourth Defense petitioners set forth in Exhibit "3" items that did not accrue within one year before the commencement of this action. It is petitioners' contention that the dates therein alleged are the dates the violations occurred, if any.

In determining that the petitioners' Fourth Defense wherein the one year Statute of Limitations provided for by Section 205(e) of the Emergency Price Control Act of 1942 as Amended and Extended June 30, 1944, was specially pleaded, did not raise a material issue of fact so as to preclude the operation of Rule 56 of the Federal Rules of Civil Procedure in favor of the respondent, the Court below reasoned that since Section 4(a) of the Act and the pertinent provisions of the Regulation make it unlawful to "*sell or deliver*" any commodity in violation of a price schedule, an action commenced within one year from the date when the commodity was "shipped and delivered" was timely, notwithstanding the fact that it was admittedly "sold" on a date more than one year prior to the commencement of the action. The language of the Court in this respect is as follows:

"The words 'sale and delivery' are not synonymous terms. They have separate and distinct meanings. It must be presumed that Congress used them according to their ordinary and usual accepted meaning and understanding. Otherwise there would have been no need to include them both in the Act. Revised Price Schedule No. 49 forbids, among others, the sale, delivery or transfer of iron or steel in excess of the maximum prices. Under both the provisions of the Act and Regulation No. 49 the sale or delivery

of iron or steel products in excess of the maximum prices constitutes separate and distinct violations. The articles having been shipped and delivered within the one-year period, the action was timely and the statute of limitations was no defense."

It is respectfully submitted that the presumptions which the Court below sees fit to indulge in in order to find a basis for its legal conclusion that the action was timely begun are wholly unwarranted and unnecessary since the Congress gave to the term "sale" definite and conclusive meaning.

Section 302(a) of the Act provides,

"The term 'sale' includes sales, dispositions, exchanges, leases, and other transfers, and contracts and offers to do the foregoing". [App. p. II.]

The term is so broadly defined that it is readily apparent that the Congress intended and did include within its sphere every conceivable physical transfer of personal property as well as contracts or offers to do so. A search of the Act will disclose that the Congress did not attach specific meaning and definition to the term "deliver" but a reading of the quoted definition *supra* demonstrates that by the use of the phrase "*and other transfers*", it did make it a part and parcel of the term "sale". But even if for the sake of this argument it was admitted that the terms are not synonymous, there can be no doubt that in an action for damages pursuant to the provisions of Section 205(e) of the Act, the term "sale" includes the term "deliver". The Congress never did intend to give to these phrases "the ordinary and usual accepted meaning and understanding" which the learned Court below in its opinion presumes. But on the contrary, it was never the intent of the Emergency Price Control Act or the Regulations promulgated thereunder, to have the enforcement of the Act turn upon the technical concepts of the law of sales."

The prohibition of the statute, when a claim for damages is prosecuted by the Administrator pursuant to the

⁶United States v. Lutz, 3rd Cir. 142 F. 2d 985.

right of action afforded him by Section 205(e) of the Act, as distinguished from an action wherein equitable relief is sought under the provisions of Section 205(a) or a criminal prosecution pursuant to Section 205(c), is against an unlawful "sale" as that term is defined by the Act and not an unlawful "delivery". This must of necessity be the fact, otherwise what damages in the nature of "overcharges" and "penalties" could the Administrator recover or the Court award where there has been an unlawful delivery without a sale? The "overcharges" and the penalties attached thereto are measured only by the amount the seller is unjustly enriched. It therefore follows that the "date of the occurrence of the violation" is not the date when delivery is completed or shipment made, but on the contrary when the seller actually becomes unjustly enriched by reason of his unlawful sale and the overcharge which he receives pursuant thereto, as that phrase is defined by Section 205(e) of the Act. The day of cleavage for the purposes of the limitation provisions made and contained in Section 205(e) of the Act is the day when the actual overcharge occurs. At that moment "*the person who buys such commodity for use and consumption other than in the course of trade of business may * * * bring an action against the seller on account of the overcharge.*" In the event that "*the buyer either fails to institute action * * * or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one year period.*" [App. p. I.]

The pertinent and controlling words in the language of Section 205(e) are "selling", "buyer", "seller" and "overcharge". That is to say, that the right of action accrues either to the buyer or the Administrator only if a person sells a commodity above the ceiling price. The buyer or the Administrator as the case may be, then and only then "within one year from the occurrence of the violation" could bring his action against the seller "on account of the overcharge." Delivery or shipment for the purposes of this Section are dates entirely foreign to the cause which gives rise to the action. The gravamen of the offense is not the unlawful delivery but the unlawful sale. The respondent realized and recognized this fact because he charged in the Fifth Paragraph of his amended complaint as follows: (R. 9)

“The defendant demanded and received for each such sale of iron and steel products a price in excess of the maximum price to be charged by said defendant pursuant to the provisions of said Revised Price Schedule No. 49 * * *”

By the language of this allegation, it is respectfully submitted the petitioners were called upon to refute only the charge of an unlawful sale. True, that the date of the delivery may be coincidental with the date of shipment and the date of the unlawful enrichment or sale, but it does not follow, as a matter of course, for the date of the delivery or shipment may very well be a date prior or subsequent to the date of the sale and the unlawful overcharge.

It is respectfully pointed out that neither Exhibit “A” attached to the amended complaint nor any affidavit, deposition or admission on file, afforded the learned Court below one iota of evidence as to the date or the dates upon which delivery of the commodities herein allegedly unlawfully sold occurred. Indeed, Exhibit “A” very carefully avoids the giving of the dates of delivery. It is limited to the date of the invoice, the name of the alleged purchaser, the invoice number, the shipping date, the purchase order number, the net cost to the purchaser, the allowable cost to the purchaser, the alleged amount of the unlawful overcharge and an incomplete list of dates upon which the alleged unlawful sales were consummated. Accordingly, it is respectfully submitted that the learned Court below was without evidentiary basis for its finding that the commodity had been delivered within the one year period and the action therefore timely commenced. It could not rightfully presume that the shipment dates were in truth and in fact the dates of delivery.

Further, the opinion of the Court below fails to give cognizance to the legislative change which the Congress effected in the language of Section 205(e) with respect to the limitations provisions therein contained. As originally written, Section 205(e) of the Emergency Price Control Act of 1942 provided as follows:

“Any suit or action under this subsection may be brought in any court of competent jurisdiction and

shall be instituted *within one year after delivery is completed* * * *.”

Prior to the time in which the respondent filed his amended complaint, the Congress amended this Section to read as follows:

“If any person selling a commodity violates a regulation * * * prescribing a maximum price * * * the person who buys such commodity for use and consumption other than the the course of trade or business may, *within one year from the date of the occurrence of the violation* * * * bring an action against the seller on account of the overcharge * * *”.

In the event that the buyer does not bring his action, then and in that event, “the Administrator may institute such action on behalf of the United States *within such one year period*.” Thus it is apparent that by reason of the legislative change, the date when delivery is completed is no longer controlling. The date of shipment was never of any importance or consequence for the purposes of this Section. Some legal efficacy must be ascribed to the legislative change, otherwise the action of the Congress would be of no moment. The only date which could possibly lend itself to the situation in an action for damages is the date upon which the sale, as that term is defined by the Act, is consummated. An examination of Exhibit “A” attached to and made a part of the amended complaint and Petitioner’s Exhibit “3” clearly demonstrates that if any sales were in truth and in fact made, they were completed and the petitioners unjustly enriched on dates more than one year prior to the commencement of the action. Therefore the defense interposed by the petitioners raised genuine and material questions of fact and law which precludes the operation of Rule 56 of the Federal Rules of Civil Procedure.

The Court below in its opinion correctly concludes that Revised Price Schedule No. 49 “forbids among others, the sale, delivery or transfer of iron or steel in excess of the maximum prices”. The Regulation does not concern itself with the *shipment* of iron or steel products in excess of the lawful ceilings. Its prohibition is against the sale, the delivery and the transfer of the commodity above the prices

fixed. It is significant to note that the language contained therein was promulgated long before the legislative change in Section 205(e) of the Act. It is elementary that a Regulation issued pursuant to the authority contained in the basic law cannot by the use of broader language enlarge the sphere of operation of the fundamental enactment.

Petitioners' Exhibit "3" attached to the Answer points out the sale of many items that occurred outside the Statute of Limitations. Because the shipping date was a different date than that of the sale, the Court without authority assumed the sales to have been made on the shipping date and misinterpreted the application of the Regulation defining sales. It is submitted that the Court is duty bound to make inquiry concerning the sale date and is duty bound to consider the matters set forth in Petitioners' Exhibit "3".

C. THE AFFIDAVITS ATTACHED TO THE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT WERE NOT ENTITLED TO ANY PROBATIVE VALUE SO AS TO FORM THE EVIDENTIARY BASIS OF THE JUDGMENT RENDERED AGAINST THE PETITIONERS.

The clear and unequivocal language of Rule 56 (e) of the Federal Rules of Civil Procedure require that supporting affidavits show upon their face that the facts therein recited would be admissible in evidence, that they are made on the personal knowledge of the affiant and that he is competent to testify to the matters stated therein. Documentary evidence referred to by the affiant must be attached to the motion and served therewith.

The Circuit Court of Appeals for the Eighth Circuit in *Walling v. Fairmont Creamery*⁷ put the rule in the following language:

"When affidavits are offered in support of a motion for summary judgment, they must present admissible evidence and must not only be made on the personal knowledge of the affiant but must show that the affiant possesses the knowledge asserted * * *. When

⁷Walling v. Fairmont Creamery Co., 139 F. 2d 318.

written documents are relied on they must be exhibited in full. The statement of the substance of written instruments or of affiant's interpretations of them, or mere conclusions of law or restatements of allegations of the pleadings are not sufficient."

This Honorable Court in *Sartor v. Arkansas Natural Gas Corporation*^{*} puts a further limitation on such depositions. It there held that affidavits composed mainly of opinion do not comply with Rule 56(e). The Court said,

"If they have any probative effect, it is that of expression of opinion by men familiar with the gas business and its opportunities for profit. But plainly opinions thus offered, even if entitled to some weight, have no such conclusive force that there is error of law in refusing to follow them. This is true of opinion evidence generally whether addressed to a jury or to a judge or to a statutory board. (Citing cases). The rule has been stated that if the court admits the testimony, then it is for the jury to decide whether any, and if any, what weight is to be given to the testimony (citing cases) * * *. The jury even if such testimony be uncontradicted may exercise their independent judgment. The mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact." (Citing cases).

With the requirements of the rule and the decided cases in mind, we pass now to the task of analyzing the affidavits which the Court below relied upon as the evidentiary basis for its judgment.

After reciting his past and present employment and experiences, calculated to qualify him as an expert in iron and steel products, Mr. Cyrus J. Kephart describes his labors not only over the books, records and accounts of the petitioners, but also "the records, insofar as appropriate kept and maintained by the carriers which transport the

^{*}*Sartor v. Arkansas Natural Gas Corp.*, 64 S. Ct. 724; 88 L. ed. 967; 321 U. S. 620.

material sold by the defendant and which is the subject matter of this suit." Thus we discover that the source of information comes from two separate and distinct sets of records. From these two separate sources Kephart "collated and assembled all of the data * * * and from the same prepared Exhibit "A" which is attached to and made a part of plaintiff's complaint". (R. 49). From his labors he concludes that, "a true and correct computation of said items of overcharge as set forth in Exhibit "A" admits of no other conclusion or result". (R. 50). An examination of this affidavit up to this point will disclose that it is without value in determining the problem presented by the motion for summary judgment when viewed in the light of Rule 56 and the decided cases, for the reason that the facts and figures which the affiant collected admittedly reflect his interpretation of the records he examined and the regulations applicable thereto. The records, books and accounts kept and maintained by the carriers which Kephart is alleged to have examined were never exhibited or made available to the petitioners as is required by the Rule of Civil Procedure. Accordingly the petitioners could not challenge the correctness and the accuracy of these computations. It is also significant to note that neither Exhibit "A" nor any allegation in the amended complaint describes either generally or with particularity the steel products which the petitioner is alleged to have sold for an unlawful price. The pertinent regulation fixes and determines by complicated computations, depending upon alloys and treatment, the selling price at which the different grades of steel can lawfully be sold. Into this computation must be figured the freight rate if any. Nowhere in the record does it appear that the petitioner was favored with this information. Accordingly the accuracy or the authenticity of the schedules made and contained in Exhibit "A" could not be specifically denied or disputed by the answer and resort of necessity had to be made to the general denial allowed and permitted by Rule 8(b) of the Federal Rules of Civil Procedure.

Proceeding further with this supporting affidavit we find the affiant saying,

"In my opinion the fact of the existence of the overcharges on the transactions involved in this suit is

not capable of being the subject matter of an honest dispute nor can any genuine issue respecting the same, in my opinion, be bona fide raised under the facts or on any competent interpretation of said regulation." (R. 50).

The worth of that declaration vanishes instanter for the obvious reason that it is not made on the personal knowledge of the affiant but is merely an expression of an opinion of one neither qualified by training or experience to express one. It invades the province of the court for it reflects merely a conclusion of law. It would not be admissible in evidence since the declarant does not possess professionally the knowledge which he asserts.

The closing paragraph of the affidavit is in the following vein:

"It is my opinion that the denials contained in the defendant's answer have not been interposed in good faith and are sham and are interposed for the sole purpose of delay and that the defendant has no good, valid or substantial defense on the merits to the plaintiff's cause of action." (R. 50).

This reckless declaration reflects a desperate and labored attempt on the part of one who so far as this record discloses, is neither qualified by training or experience to venture the simplest of legal opinions. It brazenly invades the sacred province of the Court and is obviously the distorted expression of one who has an interest in the outcome of the litigation.

The second affidavit relied upon is from Richard E. Myers, a price clerk attached to the Office of Price Administration. Under the present state of the record there is nothing to qualify him as an expert of any kind. His contribution in support of the motion is offered in the following language:

"I have read the affidavit of Cyrus J. Kephart and the facts therein set forth are true and correct according to my best knowledge, information and belief." (R. 50).

The affidavits are to the effect that the affiants examined

records of the petitioners relating to the sale of iron and steel products together with other records. That from an examination of the invoices, customers' purchase orders, freight bills, correspondence and other records and accounts relative to this litigation, they arrived at the following conclusions:

- (1) That the products had been sold.
- (2) That there had been an overcharge.
- (3) That the denials in the answer were interposed in bad faith and were sham, and that petitioner had no good and valid defense.

Thus it would appear that the Court disregarded the general denials and the Fourth and Eighth Defenses and accepted the opinion of the affiants that a sale had been consummated and an overcharge had been made without considering the matters raised in the answer, thus denying to the petitioners the right to be heard. The Court has repeatedly held that Rule 56 should be cautiously invoked to the end that parties may always be afforded a trial where there is doubt and a bona fide dispute exists between them."

CONCLUSION.

It is respectfully submitted that for the reasons hereinabove argued the petition for writ of certiorari should be granted.

BYRON G. ROGERS,
502 Midland Sav. Bldg.,
Denver 2, Colo.
Counsel for Petitioners,

W. DAVID McCLAIN,
FRANK A. BRUNO,
Of Counsel,
Midland Sav. Bldg.,
Denver, Colo.

⁹Associated Press v. United States, Vol. 89 L. ed. 1512 Adv. Op.

APPENDIX.

Sec. 205(e) of the Emergency Price Control Act of 1942 as Amended and Extended June 30, 1944, 50 U.S.C.A. App. 313.

“(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney’s fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than \$25 nor more than \$50, as the court in its discretion may determine: Provided, however, That such amount shall be the amount of the overcharge or overcharges or \$25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity as the case may be; and the word ‘overcharge’ shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the

II

buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered. The amendment made by subsection (b), insofar as it relates to actions by buyers or actions which may be brought by the Administrator only after the buyer has failed to institute an action within thirty days from the occurrence of the violation, shall be applicable only with respect to violations occurring after the date of enactment of this Act. In other cases, such amendment shall be applicable with respect to proceedings pending on the date of enactment of this Act and with respect to proceedings instituted thereafter."

Sec. 302(a)

"The term 'sale' includes sales, dispositions, exchanges, leases and other transfers, and contracts and offers to do any of the foregoing. The terms 'sell', 'selling', 'seller', 'buy', and 'buyer' shall be construed accordingly."

Sec. 302(c)

"The term 'commodity' means commodities, articles, products, and materials (except materials furnished for publication by any press association or feature service, books, magazines, motion pictures, periodicals and newspapers, other than as waste or scrap), and it also includes services rendered otherwise than as an employee in connection with the processing, distribution, storage, installation, repair, or negotiation of purchases or sales of a commodity, or in connection with the operation of any service establishment for the servicing of a commodity: Provided, That nothing in this Act shall be construed to

III

authorize the regulation of (1) compensation paid by an employer to any of his employees, or (2) rates charged by any common carrier or other public utility, or (3) rates charged by any person engaged in the business of selling or underwriting insurance, or (4) rates charged by any person engaged in the business of operating or publishing a newspaper, periodical, or magazine, or operating a radio-broadcasting station, a motion-picture or other theater enterprise, or outdoor advertising facilities, or (5) rates charged for any professional services."

Sec. 1306.151 of Revised Price Schedule 49

"The price limitations as set forth in Price Schedule No. 49 shall not be evaded either by direct or indirect methods in connection with the purchase, sale, barter, delivery or transfer of iron and steel products alone or in conjunction with any other material or by way of any commission, service, transportation or other charge * * or by way of tying agreement or other trade understanding, or otherwise."

Rule 56, Federal Rules of Civil Procedure.

Summary Judgment.

"a. For Claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the pleading in answer thereto has been served, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof."

"c. Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time specified for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

IV

“d. Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.”

“e. Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.”



23

FILED

MAY 29 1946

CHARLES ELMORE DROPLEY
CLERK

No. 1124

In the Supreme Court of the United States

OCTOBER TERM, 1945

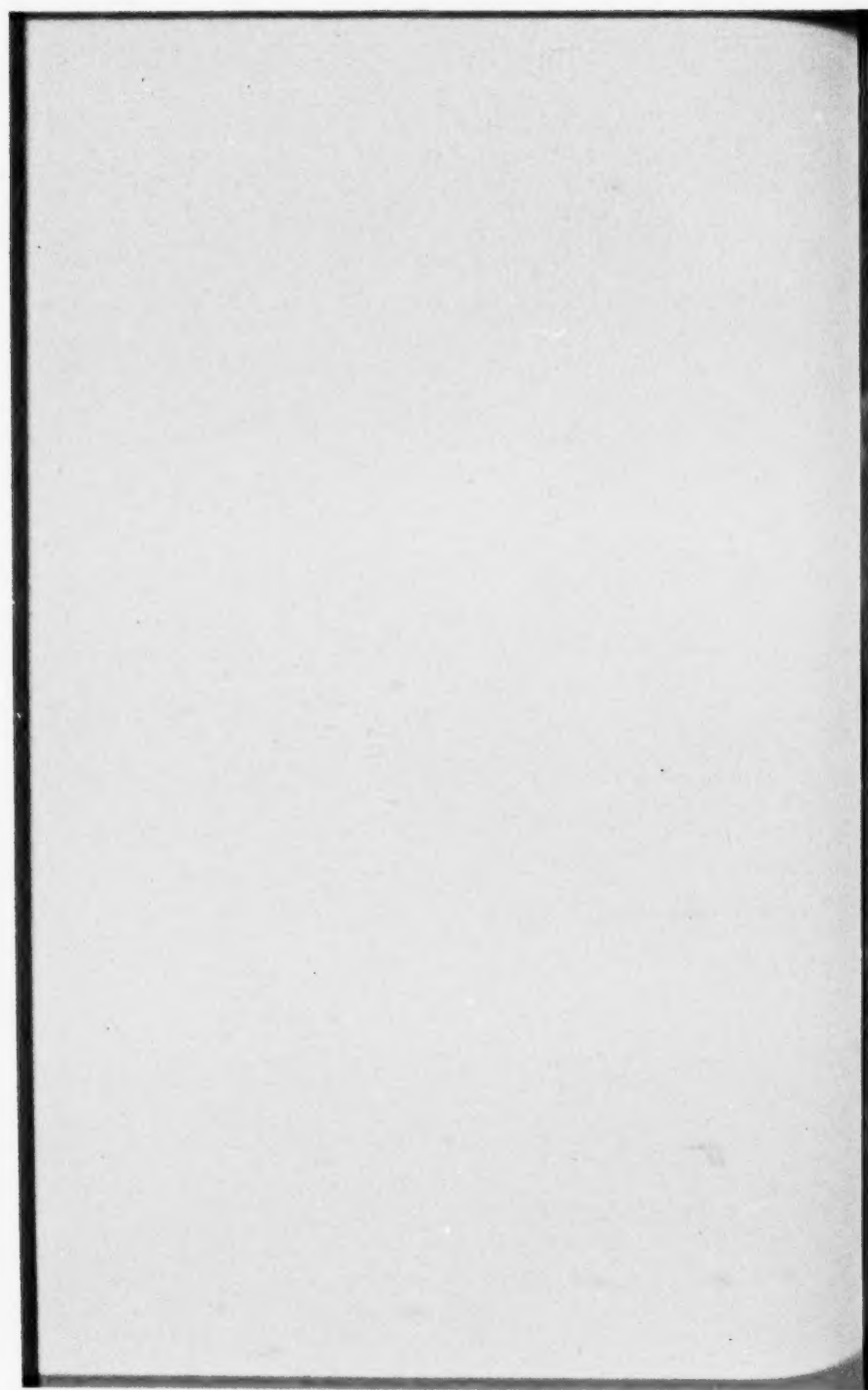
R. E. SCHREFFLER, DOING BUSINESS AS SCHREFFLER
STEEL & SUPPLY CO.; AND BYRON G. ROGERS,
GUARDIAN AD LITEM, PETITIONERS

v.

PAUL A. PORTER, ADMINISTRATOR, OFFICE OF
PRICE ADMINISTRATION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE TENTH
CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION



INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations	2
Statement	3
Argument	5
Conclusion	12
Appendix	13

AUTHORITIES

Cases:

<i>Augustine v. Bowles</i> , 149 F. 2d 93	11
<i>Bonwit Teller & Co. v. United States</i> , 283 U. S. 258	9
<i>Ganley v. Troy City National Bank</i> , 98 N. Y. 487	9
<i>McDonald v. Bowles</i> , 152 F. 2d 741	11
<i>United States v. City and County of San Francisco</i> , 310 U. S. 16	6
<i>United States v. Driggs</i> , 125 Fed. 520	9
<i>United States v. Lutz</i> , 142 F. 2d 985	9
<i>Wilkinson v. Verity</i> , L. R. 6 C. P. 206	9

Statutes and Regulations:

Emergency Price Control Act of 1942, as amended	2
Section 4 (a)	8
Section 205 (c)	3, 7, 13
Section 302 (a)	8, 15
Section 302 (c)	15
Revised Price Schedule No. 49	2
Section 1306.151	8, 18
Section 1306.152	18
Section 1306.153	18
Federal Rules of Civil Procedure, Rule 56	2, 16

Miscellaneous:

Wigmore, Evidence, 3d Ed. Vol. 4, 1230	11
Williston, Contracts (Rev. Ed.) Sec. 2031	10



In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 1124

R. E. SCHREFFLER, DOING BUSINESS AS SCHREFFLER
STEEL & SUPPLY CO.; AND BYRON G. ROGERS,
GUARDIAN AD LITEM, PETITIONERS

v.

PAUL A. PORTER, ADMINISTRATOR, OFFICE OF
PRICE ADMINISTRATION

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE TENTH
CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion in the Circuit Court of Appeals for the Tenth Circuit (R. 61-66) is reported in 153 F. 2d 1. No opinion was rendered by the District Court.

JURISDICTION

The judgment of the Circuit Court of Appeals (R. 66) was entered on January 12, 1946. A petition for rehearing (R. 66-68) was denied on

February 23, 1946 (R. 68). The petition for writ of certiorari was filed on April 16, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Whether the contracts pleaded in the Eighth Defense alleged in the answer were contracts of sale or contracts of employment.

(2) Whether an action to recover statutory damages under Section 205 (e) of the Emergency Price Control Act of 1942, as amended, may be brought after the expiration of one year from the date of the making of the contract for the sale of a commodity alleged to have been sold at a price in excess of the legal maximum price when less than a year has elapsed since the date on which the commodity was delivered.

(3) Whether the affidavits submitted by the respondent were sufficient to sustain the summary judgment.

STATUTES AND REGULATIONS

The action involves the Emergency Price Control Act, as amended,¹ Revised Price Schedule No. 49,² and Rule 56 of the Rules of Civil Pro-

¹ 56 Stat. 23, 58 Stat. 632, Public Law No. 108, 79th Cong., 1st sess., 50 U. S. C. App. 901 et seq.

² 7 F. R. 1300; 8 F. R. 4608, 7257.

cedure. The pertinent provisions of each are set forth in the Appendix.

STATEMENT

The amended complaint (R. 11-19) alleged that the defendant between April 17, 1943, and February 17, 1944, had sold iron and steel products at prices in excess of the maximum price established by Revised Price Schedule No. 49 to various purchasers none of whom purchased the products for use or consumption other than in the course of trade or business. Attached to the complaint as Exhibit "A" (R. 15-19) was a compilation showing the names of purchasers, the purchase order numbers, the dates of shipment, the invoice numbers, the net cost to purchasers, the allowable cost to purchasers, the amount of overcharges on each item, and the total overcharges. Judgment was demanded for three times the amount of the overcharges.

The defendant's answer (R. 26-42) contained nine defenses, of which only the first, third, fourth and eighth are material to a consideration of the petition for certiorari. The first defense denied generally the material allegations of the amended complaint; the third and fourth defenses pleaded that the action was barred by the one year limitation prescribed by Section 205 (e) of the Emergency Price Control Act, as to certain of the items alleged to have been sold at prices in excess of the legal maximum. The Eighth Defense alleged:

That for the period beginning April 17, 1943 and ending February 17, 1944, the time alleged in paragraph 5 of the Amended Complaint as the interim in which the alleged violations complained of were committed, and prior thereto, the said R. E. Schreffler was not engaged in the business of buying, selling, and reselling Iron and Steel products and therefore was not amenable to Revised Maximum Price Regulation No. 49, but on the contrary was in the hire and employ of Aircraft Mechanics, Incorporated, of Colorado Springs, Colorado, as a "material expediter" pursuant to a written contract, a copy of which is hereto attached and made a part hereof and marked "Exhibit 4" and was, during all times complained of in paragraph 5 of the Amended Complaint, in the hire and employ of the Douglas Aircraft Company, Inc., Los Angeles, California, in a similar capacity pursuant to an oral contract, the terms and conditions of which were substantially the same as those recited in "Exhibit 4" hereinabove referred to.

Attached to the answer as Exhibit 4 was a letter (R. 38) addressed by Aircraft Mechanics, Inc., to Schreffler Steel and Supply Co., Inc., a corporation, setting forth the terms of an agreement under which the latter was to deliver iron and steel products to the former. The agreement provided that the Schreffler Steel and Supply Co. Inc. would buy, pay for, store and deliver to Air-

craft Mechanics Inc. iron and steel products, rendering its bill to the latter for the cost of the products plus \$2.00 per hundred weight.

The respondent moved for summary judgment for single overcharges (R. 42-47) and submitted in support of the motion affidavits of Cyrus J. Kephart, a Price Specialist and Analyst in the Office of Price Administration, and of Richard E. Myers, a Price Clerk in the Iron and Steel Price Branch of the Office of Price Administration, who detailed the procedure employed by them in the preparation of Exhibit "A" to the Amended Complaint (R. 48-51). The petitioners served no responsive affidavit. The motion for summary judgment was granted (R. 51) and final judgment was entered thereon (R. 52). On appeal, the Circuit Court of Appeals for the Tenth Circuit affirmed the Judgment (R. 61-66).

ARGUMENT

(1) The Eighth Defense raised no genuine issue of fact but only a question of law, which the Court below correctly resolved. The petitioners rely on the letter (Exhibit 4 (R. 38-42)) from Aircraft Mechanics, Inc., addressed, not to the petitioners, but to a corporation which is not a party to the action. They argue that that agreement was a contract of employment and that, therefore, in making deliveries of iron and steel products to the Aircraft Mechanics Inc. they were not selling the products, and accordingly that they could not

be held liable for statutory damages under Section 205 (e) of the Act.

The construction of the contract was a question of law for the court, and not a question of fact for a jury. The alleged agreement was clearly not an employment contract but a contract of purchase and sale. The mere fact that it was denominated an agency or employment contract was insufficient to change its true character. "Mere words and ingenuity of contractual expression, whatever their effect between the parties, cannot by description make permissible a course of conduct forbidden by law." *United States v. City and County of San Francisco*, 310 U. S. 16, 28.

Under the provisions of the agreement the so-called employee was to purchase and pay for the iron and steel, store it, and deliver it to the alleged employer for a price equal to the cost to the alleged employee plus the sum of \$2.00 per hundred weight. The prices and terms of purchase were to be fixed by the alleged employee (par. g), who assumed the risk of loss (pars. e & f) and was vested with complete control of the products. He was to invoice all deliveries to the alleged employer (par. g); "to furnish warehouse or storage facilities * * * and to handle all transfers and billings" (par. i); and hire all clerical and other assistance necessary and to pay the expenses thereof (pars. j. & k). The alleged employer had no right to control the meth-

ods and means employed by the alleged employee in carrying out the contract nor was the alleged employee bound to deliver all the iron and steel he purchased to the alleged employer (witness the 18 other customers). The value of the alleged "services" bore no relationship to the "compensation" which the alleged employee was to receive. The compensation was **fixed** solely on the basis of the quantity of iron and steel delivered. On occasion, one or more of the foregoing provisions may be found in any agency or employment contract. But when all of these elements clearly negating a subordinate relationship coalesce into one agreement, only one construction is possible. The conclusion that the agreement here was one of purchase and sale is inescapable.

(2) Petitioners' contention that the action with respect to certain of the items for which recovery was allowed was barred by the one year limitation prescribed by Section 205 (e) is plainly without merit. Petitioners alleged that those items were not sold within one year from the date of the action, although they were admittedly shipped to the purchasers within that period. Section 205 (e) provides:

If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence

of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. * * * If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. * * *

Section 302 (a) of the Act defines the terms sale and selling as follows:

The term "sale" includes sales, dispositions, exchanges, leases, and other transfers, and contracts and offers to do any of the foregoing. The terms "sell," "selling," "seller," "buy," and "buyer," shall be construed accordingly.

Section 4 (a) of the Act provides:

It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, * * * in violation of any regulation or order under section 2. * * *

Revised Price Schedule No. 49 provides that no person shall "sell, offer to sell, deliver or transfer" iron or steel in excess of the maximum prices prescribed thereby. Section 1306.151.

Under the foregoing provision, the sale, and the delivery each constituted in and of itself an independent violation for which the Administrator was entitled to maintain an action under Section 205 (e). *United States v. Lutz*, 142 F. 2d 985 (C. C. A. 3rd). While but one recovery could be had, the action to effect such recovery was seasonably brought if commenced within one year from the date of the violation latest in point of time. The fact that the statute of limitations has run in respect to the offense of agreeing to receive a bribe will not bar a prosecution for the offense, subsequently committed, of actually receiving the bribe (*United States v. Driggs*, 125 Fed. 520 (C. C. E. D. N. Y.)); nor will the fact that a cause of action for an earlier conversion is barred by the statute of limitations defeat an action for a subsequent conversion of the same property by the same bailee (*Ganley v. Troy City National Bank*, 98 N. Y. 487; *Wilkinson v. Verity*, L. R. 6 C. P. 206); nor will the fact that the statute of limitations has run on a cause of action on an implied promise to refund illegally collected taxes defeat an action for the recovery of the same taxes based upon a subsequent express allowance of a claim for the refund thereof (*Bonwit Teller & Co. v. United States*, 283 U. S. 258). The rule is thus well established that where the law creates two or more rights (as distinguished from remedies) the

fact that the statute of limitations has run on one of such rights will not bar an action based on a subsequently accruing right to the same recovery or relief. Williston, *Contracts* (Rev. Ed.), Sec. 2031. Consequently, the fact that more than a year had elapsed since the contract of sale does not defeat an action brought within one year from the dates of the delivery of the commodities.

3. The affidavits submitted in support of the motion for summary judgment were, contrary to petitioners' contention, clearly sufficient to support the judgment. The affidavit of Cyrus J. Kephart states (R. 49):

Pursuant to instructions received by me from my superiors, I attended at the defendant's place of business in Denver, Colorado, during the month of July 1944 for a period of approximately three weeks. While there, I examined the defendant's records relating to the sale of iron and steel products, and insofar as the same were made available to me I examined the defendant's invoices, customers' purchase orders, freight bills, correspondence, and all other records, papers and accounts relative to this litigation. In addition, I examined defendant's own purchase orders, and invoices issued to him by his suppliers, together with the records insofar as appropriate, kept and maintained by the carriers which transported the material sold by the defendant, and which is the subject matter of this suit.

I collated and assembled all of the data so obtained and from the same prepared exhibit "A", which is attached to and made a part of the plaintiff's complaint.

The compilation attached to the complaint (Exhibit "A") which states the particulars of the claim against petitioners is, therefore, nothing more than a transcript of records of the petitioners and the carriers who transported the material which the petitioners sold at excessive prices. Such a compilation was clearly admissible in evidence. *Augustine v. Bowles*, 149 F. 2d 93 (C. C. A. 9); *McDonald v. Bowles*, 152 F. 2d 741 (C. C. A. 9); Wigmore, Evidence, 3d Ed., Vol. 4, 1230.

The records from which the compilation was prepared were either in petitioners' possession or as readily available to them as to the respondent. Furthermore, the record shows that "there was supplied to said defendant all and singular the accountant's work sheets relating to each and every sale, transaction or item involved in suit, specifying all the factors of permissible charge, as well as all items of overcharge, freight rate allowances, etc., as well as analyses of items shipped." (R. 22).

In face of all of the foregoing, the petitioners did not submit any affidavits or other proof challenging the correctness of the compilation. In these circumstances, the compilation must be

accepted as true. Compare, *McDonald v. Bowles, supra.*

The affidavits contain averments of all the essential facts necessary to establish the correctness of the compilation. Any statements of conclusions or opinion in the affidavits are mere surplusage. If they are stricken entirely from the affidavits, the affidavits would still be sufficient to support the judgment.

CONCLUSION

The judgment of the court below was clearly right. It is not in conflict with the decision of any other court. No question requiring review by this Court is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted.

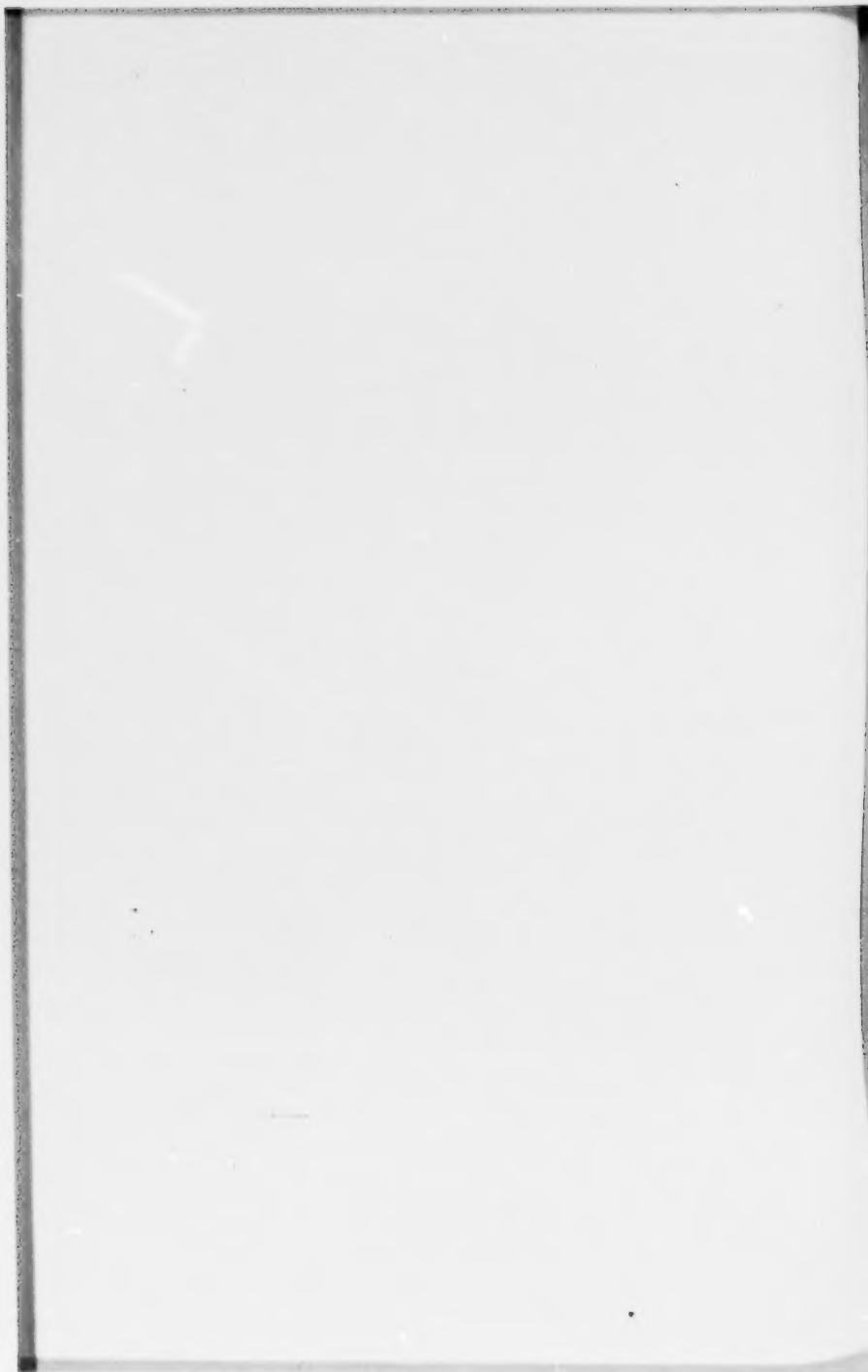
J. HOWARD McGRATH,
Solicitor General.

GEORGE MONCHARSH,
Deputy Administrator for Enforcement.

MILTON KLEIN,
Director, Litigation Division.

MAY 1946.





APPENDIX

Emergency Price Control Act of 1942, 56 Stat. 23, as amended and extended June 30, 1944, 58 Stat. 632, U. S. C. App. 901:

Section 205 (e):

If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, *within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than \$25 nor more than \$50, as the court in its discretion may determine: Provided, however, That such amount shall be the amount of the overcharge or overcharges or \$25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation.*¹

¹ As amended by sec. 108 (b) of Stabilization Extension Act of 1944. Formerly read, in place of italicized language:

For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price.² If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such

"* * * bring an action either for \$50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court."

² Added by sec. 108 (b) of Stabilization Extension Act of 1944.

judgment was rendered.³ [The amendment made by subsection (b), insofar as it relates to actions by buyers or actions which may be brought by the Administrator only after the buyer has failed to institute an action within thirty days from the occurrence of the violation, shall be applicable only with respect to violations occurring after the date of enactment of this act. In other cases, such amendment shall be applicable with respect to proceedings pending on the date of enactment of this Act and with respect to proceedings instituted thereafter.]⁴

Section 302 (a):

The term "sale" includes sales, dispositions, exchanges, leases, and other transfers, and contracts and offers to do any of the foregoing. The terms "sell", "selling", "seller", "buy", and "buyer", shall be construed accordingly.

Section 302 (c):

The term "commodity" means commodities, articles, products, and materials (except materials furnished for publication by

³ As amended by sec. 108 (b) of Stabilization Extension Act of 1944. Formerly read, in place of italicized language:

"* * * is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States. Any suit or action under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed or rent is paid. The provisions of this subsection shall not take effect until after the expiration of six months from the date of enactment of this Act."

⁴ Sec. 108 (c) of Stabilization Extension Act of 1944.

any press association or feature service, books, magazines, motion pictures, periodicals and newspapers, other than as waste or scrap), and it also includes services rendered otherwise than as an employee in connection with the processing, distribution, storage, installation, repair, or negotiation of purchases or sales of a commodity, or in connection with the operation of any service establishment for the servicing of a commodity: *Provided*, That nothing in this Act shall be construed to authorize the regulation of (1) compensation paid by an employer to any of his employees, or (2) rates charged by any common carrier or other public utility, or (3) rates charged by any person engaged in the business of selling or underwriting insurance, or (4) rates charged by any person engaged in the business of operating or publishing a newspaper, periodical, or magazine, or operating a radio-broadcasting station, a motion-picture or other theater enterprise, or outdoor advertising facilities, or (5) rates charged for any professional services.

Rule 56, Federal Rules of Civil Procedure.
Summary Judgment:

a. *For claimant.*—A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the pleading in answer thereto has been served, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

* * * * *

c. *Motion and proceedings thereon.*—The motion shall be served at least 10 days before the time specified for the hearing. The adverse party prior to the day of hearing

may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

d. *Case not fully adjudicated on motion.*—If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

e. *Form of affidavits; further testimony.*—Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented

or opposed by depositions or by further affidavits.

REVISED PRICE SCHEDULE NO. 49

§ 1306.151. *Maximum prices for the resale of iron and steel products.*—On and after December 15, 1941, regardless of the terms of any contract of sale or purchase, or other commitment, no seller, as defined in § 1306.157 (b) of this Revised Price Schedule No. 49, shall sell, offer to sell, deliver or transfer iron or steel products, and no person shall buy, offer to buy or accept delivery of iron or steel products at higher than the maximum prices set forth in the appendices to this Revised Price Schedule No. 49.

§ 1306.152. *Less than maximum prices.*—Lower prices than those established by this Revised Price Schedule 49 may be charged, demanded, paid or offered.

§ 1306.153. *Evasion.*—The price limitations set forth in this price schedule shall not be evaded either by direct or indirect methods in connection with a purchase, sale, barter, delivery or transfer of iron or steel products alone or in conjunction with any other material, or by way of any commission, service, transportation, or other charge, or by way of discount, premium, or other privilege, or by way of tying agreement or other trade understanding, or otherwise. No person shall subdivide an order or shipment for the purpose of avoiding any of the requirements of this Revised Price Schedule 49. (Last line added by 9 F. R. 604.)

